UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STATION GVR ACQUSITION, LLC D/B/A GREEN VALLEY RANCH RESORT SPA CASINO **AND** **LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION LOCAL 165, AFFILIATED WITH UNITE HERE**	**Case No. 28-RC-208266**

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

Harriet Lipkin
DLA Piper LLP (US)
500 Eighth Street NW
Washington, D.C. 20004

Kevin Harlow
DLA Piper LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101
(619) 699-3402

Attorneys for Employer,
STATION GVR ACQUISITION, LLC
d/b/a Green Valley Ranch Resort Spa Casino

April 5, 2018

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino ("GVR" or the "Employer") hereby requests review of the Decision and Certification of Representative ("Certification Decision") issued by the Regional Director of Region 27 on March 23, 2018.

I. INTRODUCTION

The material facts in this case are undisputed. The Union admits that it directed bargaining unit employees to "sign up" to vote on Union-prepared "Election Day Sign Up Sheets"; directed its "special agents" within the bargaining unit (called "Committee Leaders") to question other bargaining unit employees as to whether they had voted; and directed the Committee Leaders to report back to the Union who had and had not voted. The Union compiled the information reported by the Committee Leaders into an electronic database (*i.e.*, a "list"). On the first day of a two-day election, the Union used this electronic list to target bargaining unit employees who had not voted for additional phone calls or house visits by the Union, creating the unmistakable and accurate impression that the Union knew they had not voted.

Despite these facts, the Regional Director determined that the Union had not engaged in objectionable conduct because bargaining unit employees were not "actually aware" that the Union had compiled the information that it had requested, received, and used into a formal "list." This Request for Review presents the following questions:

- Is it permissible for a union – with the knowledge and assistance of bargaining unit employees – to request, receive, and use partial lists of who has and has not voted, so long as the lists are not in writing?
- Is it permissible for a union – with the actual knowledge of bargaining unit employees – to monitor and track the voting activities of eligible voters, so

long as the bargaining unit employees do not have actual knowledge that the Union has compiled the information into a formal "list"?

- Was the Regional Director correct that a bargaining unit employee who: (a) is asked by a Union "special agent" to identify the specific date and time she intends to vote; (b) is asked by that same Union special agent on the day of the election whether she has voted; (c) informs the Union special agent that she had not voted; and then (d) receives a house visit or phone call from the Union later that night soliciting her to vote, would not "reasonably infer" that the Union was tracking whether she had voted?

The Employer submits that the answer to each of these questions is "no." The Regional Director disagreed. The Employer respectfully requests that the Board weigh in.

II. STATEMENT OF THE CASE

As noted above, the Employer has no material disputes with the Regional Director's underlying factual findings. The following facts are taken directly from the Hearing Officer's Report and the Certification Decision.

A. Pre-Election Background and Special Agent Status

"Pursuant to a Stipulated Election Agreement, an election was conducted on November 8 and 9, 2017 in a unit of certain of the Employer's hotel, resort, and casino employees ('team members')." (Certification Decision at p. 1.)[1] Prior to the election, the Petitioner "organized an in-plant organizing committee comprised of . . . employees of the Employer, whose members were known as Committee Leaders." (Hearing Officer's Report ("HO Report") at p. 5.) "The Committee Leaders wore a union button that displayed the union logo and the words 'Committee Leader.'" (*Id.*) "From about June 2017 to the election," the number of Committee Leaders "increased from about 50 Committee Leaders to about 60-70 Committee Leaders." (*Id.*)

[1] The Hearing Officer's Report is attached as Exhibit 1. The Certification Decision is attached as Exhibit 2. All cited transcript pages are attached as Exhibit 3. The hearing exhibits cited by the Employer are attached as Exhibits 4 and 5.

"The Committee Leaders were much involved in Petitioner's organizing efforts." (*Id.*) In particular, "during the critical period preceding the election, the Petitioner created and made use of 'Election Day Sign Up' sheets. These contained a list of names and contact information of employees the Petitioner had determined were likely to vote for the union opposite a grid with the polling dates and times." (Certification Decision at p. 5; *see also* Exs. 4 & 5.) The sheets "targeted approximately 568 team members whom the Petitioner believed would vote for the Petitioner." (HO Report at p. 9.) The Union "distributed sign-up sheets to approximately 60-70 Committee Leaders." (*Id.* at p. 10.) "For the most part, each Committee Leader received a sign-up sheet with a unique list of team members [and their contact information]." (*Id.*) The Committee Leaders were "instructed [by the Union] to contact the team members on their list and get the team members to commit to vote on a certain date and time." (HO Report at pp. 5, 10.)

"The record establishes that Committee Leaders followed the [Union's] instructions." (*Id.* at p. 10.) Specifically, the "evidence . . . shows that Committee Leaders did, at the Petitioner's instruction, ask team members on sheets assigned to them whether and when they intended to vote, and reported this information to union organizers . . . ." (Certification Decision at p. 5.) The Hearing Officer and Regional Director correctly determined that the Union had "endowed committee leaders with actual authority" and that the "Committee Leaders were special agents of the Petitioner for purposes of polling team members regarding whether or when they intended to vote, and to report that information back to the Petitioner, using the sign-up sheets created by the Petitioner for that purpose." (*Id.* at p. 6; HO Report at p. 13.)

B. Election Day Misconduct

On the days of the election, the Union "instructed committee members to ask [the team members on their Sign Up sheets] if they had voted." (HO Report at p. 24.) The Union further "instructed Committee Leaders to report to them who on their sign-up sheets had voted." (*Id.*) "The record establishes that the Committee Leaders did just that." (*Id.*)

Specifically, "during the election, Committee Leaders did observe and make some verbal reports to Petitioner's organizers that certain team members had voted, or at least told Committee Leaders that they had voted." (Certification Decision at p. 11.) The "Committee Leaders told the Petitioner what they had learned and the Petitioner electronically recorded the information." (*Id.*) "This 'data,' which for all intents and purposes was an active list of those who had voted, was stored electronically at the Petitioner's office . . . ." (HO Report at p. 24.) "Petitioner used [this list] to determine which of [its] likely supporters had not yet voted, and then directed 'get out the vote' efforts toward those voters, including calling them to remind them to vote." (Certification Decision at p. 11.)

C. Post-Election Proceedings

Despite the undisputed facts above, the Hearing Officer and Regional Director concluded that the Union's conduct was not objectionable, albeit on slightly different grounds. The Hearing Officer implicitly acknowledged that bargaining unit employees – including the Committee Leaders themselves – knew the Union was tracking whether team members had voted, but found that team members would reasonably believe those efforts were related to permissible electioneering away from the polls rather than

impermissible list-keeping. (HO Report at pp. 25-26.) The Regional Director correctly declined to rely on that rationale because it makes no sense – even if the Committee Leaders and other employees believed that the information was being used for "electioneering" purposes, that does not change the fact that they knew the Union was actively tracking who was voting. (*See* Certification Decision at p. 12 n.4 (declining to rely on Hearing Officer's rationale).)

The Regional Director's alternative rationale, however, is even more baffling. She concluded that there was no evidence that voters were "actually aware" of the "electronic list" and that "no circumstances were present that would reasonably alert employees that their voting was being tracked." (Certification Decision at p. 12.) She did so despite acknowledging two paragraphs earlier that the Committee Leaders – *who are themselves bargaining unit employees* – "did observe and make some verbal reports to Petitioner's organizers that certain team members had voted." (*Id.* at p.11.) The Regional Director also declined to address the Employer's argument – squarely raised in its Exceptions Brief – that the oral lists submitted by Committee Leaders were themselves objectionable lists of who had and had not voted. (*See id.* at p. 12 (noting the Employer's Exception but failing to address why the oral lists are not objectionable).)

III. ARGUMENT

The keeping of a voter list is *per se* objectionable and grounds for setting aside the election "when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *See generally Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 737 (1990). There is no requirement that the objecting party demonstrate an "actual interference with the voters' free choice." *Id.* As always, whether conduct is

objectionable is not based upon the subjective impressions or testimony of employees, but rather that of an objectively reasonable voter. *Lake Mary Health Care Assocs., LLC*, 345 N.L.R.B. 544, 547 fn.3 (2005) ("[W]hether a [party] intends its conduct to interfere with an election or whether the conduct actually affected the election are irrelevant because the test is an objective one viewed from the standpoint of a reasonable employee.").

A. The Oral Lists Were Objectionable

As set forth above, it is undisputed that the Committee Leaders – who are themselves bargaining unit team members – questioned the team members assigned to them on their "Sign Up" sheets as to whether they had voted and then reported back to the Union on which employees had and had not voted. The Hearing Officer euphemistically labeled these as "verbal reports." (Certification Decision at p. 12.) Put simply, a compilation of employees who have and have not voted is a "list," even if it comprises less than the entire bargaining unit.

Because the Regional Director failed to offer any explanation for why these lists were not objectionable, the Employer can only speculate. One potential rationale is that because the lists were oral rather than written, they would not convey the impression of surveillance to team members. *Medical Cntr. for Beaver Cnty.*, 716 F.2d 995, 1000 (3rd Cir. 1983) (finding "abundant circumstantial evidence" to support that team members were aware of list-keeping where party checked off names near employee entrance). But that rationale makes no sense in the context of this case, where bargaining unit employees were themselves creating the lists and therefore indisputably aware of them.

Another possibility is that the Regional Director implicitly concluded that partial list-keeping is not objectionable. But earlier in the decision, she acknowledged that the Sign-Up sheets containing the same number of employees were "lists," and her entire analysis implicitly acknowledges that if bargaining unit employees were aware of the electronic "list" being maintained by the Union (which also did not include the entire bargaining unit) the list-keeping would be objectionable. (Certification Decision at pp. 5, 11-12.) Moreover, the Employer is aware of no authority, and the Regional Director cited none, holding that partial list-keeping is permissible, particularly where, as here, 60-70 bargaining unit employees are actively engaged in the "partial" list-keeping.

A final possibility is that employees *other* than the Committee Leaders were not aware of the oral lists, and the Committee Leaders participated in and consented to the list-keeping, and so no bargaining unit employee was actually coerced. (*See* Certification Decision at p. 12 (noting that no other voters were present when Committee Leaders reported who had voted to the Union).) But as set forth above, once a party establishes that eligible voters were aware of the list-keeping, whether any voter was subjectively coerced is irrelevant. *Days Inn*, 299 N.L.R.B. at 737. And here there was indisputably voter knowledge, because eligible voters were the ones preparing the lists. Accordingly, even absent any additional Union conduct associated with the lists, the Regional Director erred in concluding that the oral voter lists prepared and submitted by the Committee Leaders were not objectionable.

B. The Union Created An (Accurate) Impression of Surveillance

The Regional Director further erred by focusing on whether bargaining unit employees were "actually aware" of the existence of the "electronic list" itself. Board

law makes abundantly clear that, while technically prohibited, it is not the creation of the list itself that is objectionable; it is the inherent coerciveness and destruction of laboratory conditions caused by giving voters the impression (or actual knowledge) that a party is tracking whether they had voted. *Med. Ctr. of Beaver Cty., Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983) ("In the interest of ensuring free, non-coerced elections, the Board has set aside elections if employee voters know, or reasonably can infer, that their names are being recorded on unauthorized lists. Absent such knowledge or interference on the part of voters, any list-keeping activity, although technically prohibited, obviously could not interfere with the exercise of voter free choice . . . ."); *see also Days Inn*, 299 N.L.R.B. at 736 ("The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded."); *Hydro-Aire Div., Crane Co.*, 281 N.L.R.B. 979, 980 (1986) (test is whether party's action would "reasonably tend to create an impression of surveillance"); *Masonic Homes of Cali., Inc.*, 258 N.L.R.B. 41, 48 (1981) ("[E]mployees must be permitted to cast their ballots in secret, in complete freedom, and without fear of reprisal or discipline. Activity that reasonably can be construed as improper is proscribed, whether or not the activity is, in fact, improper.").

Here, the Regional Director got the analysis backwards. It is indisputable that at least 60-70 bargaining unit employees – the Committee Leaders – had actual knowledge that the Union was tracking the voting activities of eligible voters, because they were the ones doing the tracking (at the Union's express direction). It is that underlying knowledge of surveillance – not the list-keeping itself – that destroys the laboratory

conditions. The Regional Director plainly erred by concluding that the underlying impression of surveillance was not objectionable so long as employees were unaware of the actual list.

C. Voters Reasonably Inferred The Existence Of The List

Finally, even if the Regional Director were correct that it is employee knowledge of the list – rather than knowledge of the underlying surveillance of their voting activities – that is dispositive, the Regional Director erred in failing to conclude that employees would "reasonably infer" the existence of the list. *See, e.g. Med. Ctr. of Beaver Cty.*, 716 F.2d at 999. "The fundamental test [in deciding whether to draw an inference] is whether there is a rational connection between the facts proved and the fact that is to be inferred." *NLRB v. Wal-Mart Stores, Inc*., 488 F.2d 114, 117 (8th Cir. 1973). As Board law makes clear in a variety of contexts – including, for example, campaign literature – the Board has great respect for employees. *See Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 60 (1966) ("Board has given wide latitude to competing parties in a labor dispute and does not 'police or censor propaganda,' but 'leaves to the good sense of the voters the appraisal of such matters'"); *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) (employees will not miss the inferences of promises of benefits or threats of reprisals in campaign speeches); *Christie Elec. Corp.*, 284 N.L.R.B. 740, 755 (1987) (legality of [a party's] remarks often depends on nuances of phrasing…because employees are notoriously and understandably sensitive to anything resembling a suggestion of retaliation"). "Workingmen do not lack capacity for making rational connections." *Thomas v. Collins*, 3232 U.S. 516, 535 (1945)

Here, at least two groups of employees would have reasonably inferred the existence of a "list." First, the Committee Leaders. The facts known to the Committee Leaders were: (a) the Union invested considerable time and effort to prepare the "Sign Up" sheets and obtain the specific dates and times employees intended to vote; (b) on the day of the election, the Committee Leaders were expressly directed to question employees as to whether they had voted; (c) they were expressly directed to report this information back to the Union; and (d) they did so in secret, out of view of other voters. No rational employee would assume the Union went through this time and expense for no reason; rather a rational employee would assume the Union intended to use the information it went to great pains to collect.

Second, the employees who were targeted for additional solicitation because they had not voted. The facts known to those team members were: (a) a Union "special agent" asked them to identify the specific date and time they intended to vote; (b) on the day of the election, that same Union special agent asked them if they had not voted; (c) they informed the Union special agent that they had not voted; and then (d) they received a phone call or house visit from the Union later than night urging them to vote. *See generally Marathon Le Tourneau Co.*, 208 N.L.R.B. 213, 223-24 (1974) (party engaged in objectionable conduct where it maintained list of employees who had and had not voted, particularly where there were multiple voting session and the party "had the opportunity to convert that list to its own use"), *enf'd*, 498 F.2d 1400 (5th Cir. 1974); *Piggly-Wiggly #011*, 168 N.L.R.B. 792, 792 n.2 (1967) (finding list-keeping objectionable, and noting the allegation that the list was used to contact employees who had not voted to urge them to vote in the election). To assume that employees would not

have been able to "connect the dots" in these circumstances attributes an unwarranted and insulting degree of naiveté and ignorance to employees that is inconsistent with Board law in all other contexts. Consequently, even if employee knowledge of the list itself were dispositive, the Regional Director erred in concluding that employees would not have reasonably inferred the existence of that list. [2]

---

[2] Because the Board will grant a request for review "only where compelling reasons exist therefor," the Employer has focused its brief only on the facts and arguments that it believes compel the Board to set aside the Regional Director's decision. However, to avoid any inference of waiver, the Employer continues to maintain that:

- The "Sign Up Sheets" themselves are inherently coercive because asking a voter to identify the specific date and time she intends to vote creates the reasonable impression that the party intends to use that information to monitor the employee's vote (otherwise why ask for that level of detail?). That is qualitatively different than a pre-election "poll" that merely asks whether the employee intends to vote, or how she intends to vote. (HO Report at pp. 9-11, 24; Tr. at 90:25-92:11, 139:11-17, 184:23-185:17, 295:14-297:1, 613:25-614:3, 659:18-20, 705:23-706:1, 719:23-720:13, 723:4-724:2; *see also* Exs. 4 & 5; *Hydro-Aire Div., Crane Co.*, 281 N.L.R.B. 979, 980 (1986) (test is whether party's action would "reasonably tend to create an impression of surveillance").

- The Hearing Officer committed plain error and demonstrated bias by disregarding the unequivocal testimony of Cristina Herescu that she was "told" to write her name on the Sign Up Sheet. (HO Report at pp. 11, 14, n.8.) While Spanish is not her native language (in fact, she is tri-lingual), she testified unequivocally that she understood precisely what was said. (Tr. at 164:4-12.) The Hearing Officer (whose finding was adopted by the Regional Director) disregarded this testimony based on nothing more than his own speculation that she did not understand the "true connotations" of the statement. (Certification Decision at p. 7.) The Hearing Officer's decision to disregard her testimony is particularly remarkable because, although within its power to do so, the Union did not call the Committee Leader (the Union's "special agent") to contradict her testimony. *See, e.g., Greg Constr. Co.*, 277 N.L.R.B. 1411, 1419 (1985) ("When a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.").

- There was repeated, uncontradicted testimony by multiple election observers that Union supporters were patrolling and escorting employees to the polls. (HO Report at pp. 15, 21-22; Tr. at 66:25-67:6, 135:1-4, 176:9-22.) The Hearing Officer and Regional Director erred by holding that it was the Employer's burden to specifically

IV. CONCLUSION

For the reasons set forth above, the Regional Director's Certification Decision should be set aside and the results of the election should be vacated.

Respectfully Submitted,

Date: April 5, 2018

/s/ Harriet Lipkin
Harriet Lipkin
DLA Piper LLP (US)
500 Eighth Street NW
Washington, D.C. 20004

Kevin Harlow
DLA Piper LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101

identify the individuals, but then quashing the subpoena for the identities of the Committee Leaders which would have permitted the Employer to meet its burden and to question witnesses with more specificity. (Certification Decision at pp. 4-5.)

CERTIFICATE OF SERVICE

I hereby certify this 5th day of April, 2018, that a copy of the Employer's Request for Review of the Regional Director's Decision and Certification of Representative was electronically served on:

Paula S. Sawyer, Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
Paula.Sawyer@nlrb.gov

José R. Rojas, Hearing Officer
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
Jose.Rojas@nlrb.gov

Elise Oviedo, Esq.
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South,
Suite 2-901
Las Vegas, NV 89101
Elise.Oviedo@nlrb.gov

Eric B Myers, Esq.
McCracken, Stemerman and Holsberry, LLP
595 Market St., Ste. 800
San Francisco, CA 94105-2821
ebm@msh.law

Kimberley C. Weber, Esq.
595 Market St. Ste. 800
San Francisco, CA 94105-2813
kweber@msh.law

/s/ Kevin Harlow
An Employee of DLA Piper LLP (US)